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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~A-55~~

JERSEY CITY EDUCATION ASSOCIATION, LOUIS T. SCIALLI, THOMAS FAVIA, SARAH GROCHOW, GAIL ROMANOWSKI, DORIS E. FILLIPPONE, ETHEL P. BROWN, DANIEL CUPO, GAIL HALL, BARBARA SCHNEIDER and ROBERT ROGENSTEIN, individually and as Officers and Members of the Executive Board of the Jersey City Education Association, and FRANK AMARATO, MARY DAVIS, MARGARET DEL PRETE, DIANNE FERRARA, BERNICE MACCHIA, NEIL PAGANO, MICHAEL WARJANKA, MAE McCOMB, MYRA DANIEL,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT	4
REASONS FOR GRANTING THE WRIT	8
Point I—This Court should examine and delineate the ambit of the "right to organize"	8
Point II—The injunctive order was clearly unconstitutional not only for overbreadth and vagueness in itself, but as interpreted by the courts below, to prohibit constitutionally mandated actions	16
Point III—The injunctive order was clearly unconstitutional as interpreted to require proof of non-guilt by the defendants	19
Point IV—Notice of the issuance of the injunction was unconstitutionally imputed to the Pagano group in violation of the Fourteenth and First Amendments	20
Point V—Equal protection of the laws and due process guaranteed by the Fourteenth Amendment were denied the petitioners by the imposition of a fine of $10,000 on the association when the general maximum fine for misdemeanors in New Jersey is $1,000 and for petty offenses $500	23
CONCLUSION	27

PAGE

APPENDIX:

A—Order of Supreme Court, Denying Petition for Certification 1a

B—Opinion of the Superior Court of New Jersey, Appellate Division 2a

C—Order of Honorable William J. Brennan, Jr. 19a

D—New Jersey Constitution and Statutes 20a

Cases Cited

B. of E., Union Beach v. N. J. A. E., et al., 53 N. J. 29, 247 A. 2d 867 (1968) 12

Bloom v. Illinois, 391 U. S. 194 (1968) 24

Brotherhood of Railway Trainmen v. Virginia, 377 U. S. 1 (1964) 11

Buehrer, In re, 50 N. J. 501, 236 A. 2d 592 (1967) 26

Carrol v. President and Com. of Princess Anne, 393 U. S. 175 (1968) 19

Cheff v. Schnackenberg, 384 U. S. 373 (1966) 24

Commonwealth v. Hunt, 4 Metc. 111 (Mass. 1842) 13, 14

Duncan v. Louisiana, 391 U. S. 145 (1968) 23, 24

Garrigan v. U. S., 163 F. 16 (C. C. A. 7, 1908), cert. denied, 214 U. S. 514 (1909) 21

Garrity v. New Jersey, 385 U. S. 495 (1967), reversed, 44 N. J. 259, 208 A. 2d 146 (1965) 20

Hague v. CIO, 307 U. S. 496 (1939) 9

International Union U.A.W., A.F.L. v. Wisconsin Industrial Relations Board, 336 U. S. 245 (1945) 9

PAGE

Keyishian v. Board of Regents, 385 U. S. 589 (1967) 20

NAACP v. Alabama, 357 U. S. 449, 2 L. ed. 2d 1488, 78 S. Ct. 1163 (1958) 9, 19

NAACP v. Button, 371 U. S. 415 (1963) 11

Near v. Minnesota, 283 U. S. 697 (1931) 19

Pickering v. Board of Education, 391 U. S. 563 (1968) 19, 20

Rex v. Journeymen Tailors of Cambridge, 8 Mod. 10 (1721) 13

Robinson v. Cahill, et al., Docket No. L-18704-69 5

Roth v. Board of Regents of State Colleges, 310 F. 2 972 (D. C. Min. 1970) 19

Spevak v. Klein, 385 U. S. 511 (1967) 20

State v. Janiec, 25 N. J. Super. 197, 95 A. 2d 762 (N. J. A. D. 1953) 27

State v. Owens, 54 N. J. 153, 254 A. 2d 97 (1969) 25

Textile Workers v. Lincoln Mills, 353 U. S. 448 (1957) 15

Thomas v. Collins, 323 U. S. 516 (1945) 9

United Mine Workers v. Illinois Bar Association, 389 U. S. 217 (1967) 11

United Steelworkers of America v. Woman & Gulf Trans. Co., 363 U. S. 574 (1960) 15

United Transportation Union v. State Bar of Michigan, 39 L. W. 4428 (April 6, 1971) 11

United States Constitution Cited

First Amendment 3, 4, 20

PAGE

Fifth Amendment 3, 4, 20

Fourth Amendment 3, 4, 20, 23, 26

New Jersey Constitution Cited

1947—

Article I, paragraph 19 ..... 4, 9

Statutes Cited

5 Geo. 4, c. 95 (Combination Act, 1824) 13

L. 1968, Ch. 303 6

Ch. 113 24

N.J.S. 2A:§5-1 26

N.J.S.A. 2A:10-1 4

N.J.S.A. 2A:85-6 4

N.J.S.A. 2A:85-7 ..... 4, 25

N.J.S.A. 2A:169-4 ..... 4, 24

N.J.S.A. 34:13A-1 (New Jersey Employer-Employee Relations Act) 11

State Crimes Act 26

28 U.S.C.:

Sec. 1257 (3) 3

Other Authorities Cited

Hawkins, Pleas of the Crown (1716):

bk. 1, c. 72, Sec. 2 13

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p. 50 13

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Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Jersey City Education Association (hereinafter referred to as the "Association"), Louis T. Scialli, Thomas Favia, Sarah Grochow, Gail Romanowski, Doris E. Fillippone, Ethel P. Brown, Daniel Cupo, Gail Hall, Barbara

Schneider and Robert Rogenstein, individually and as Officers and Members of the Executive Board of the Jersey City Education Association (hereinafter referred to as the "Scialli Group") and Frank Amarato, Mary Davis, Margaret Del Prete, Dianne Ferrara, Bernice Macchia, Neil Pagano, Michael Marjanka, Mae McComb and Myra Daniel (hereinafter referred to as the "Pagano Group"), petition for a writ of certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey.

Opinions Below

The order of the Supreme Court of New Jersey denying certification to review the decision of the Appellate Division of the Superior Court of New Jersey was rendered without opinion and is set forth at Appendix A. The opinion of the Appellate Division of the Superior Court of New Jersey on the appeal from the summary conviction for violating a restraining order of the Chancery Division of the Superior Court of New Jersey is reported in 115 N. J. Super. 42, 278 A. 2d 206 (App. Div. May 21, 1971), and is set forth at Appendix B. Mr. Justice Brennan, by order dated July 23, 1971, stayed the execution of the judgment, pending filing of a petition for writ of certiorari, and this order is set forth at Appendix C.

Jurisdiction

The order of the Supreme Court of New Jersey denying certification was entered on July 7, 1971. The opinion of the Appellate Division of the Superior Court of New Jersey is dated May 21, 1971. Mr. Justice Brennan's order staying the execution of this judgment is dated July

23, 1971, and is conditioned on the filing of the petition for a writ of certiorari on or before August 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

Questions Presented

1. Does not the right to organize as contained in the New Jersey Constitution bring with it as essential attributes necessary for the existence of such an association rights protected by the First and Fourteenth Amendments to the United States Constitution against State interference—in this case the right of public employees to form an organizaion which is essentially defeated and negated, if the organization does not have the right to withhold its labor in a dispute with an employer, especially in the absence of any other method of resolving such disputes; e.g., arbitration?

2. Does not an injunction against picketing, striking and withholding labor violate rights under the First and Fourteenth Amendments to the United States Constitution when such injunction is interpreted to prohibit Association representatives from representing their Association and presenting Association proposals at the only time in which the governmental entity which employed them holds its meetings, if to make such presentation requires their absence from employment on that date?

3. Are not the Fourteenth and Fifth Amendments to the United States Constitution abridged by State court action inferring participation in an enjoined strike from the fact that individuals absented themselves from school without prior explanation, thereby putting the burdens on the accused to exonerate themselves, absent any other proof of aiding, abetting or participating in such strike?

4. Are not rights under the Fourteenth, Fifth and First Amendments to the United States Constitution abridged by State court action imputing notice of an injunction against striking to non-parties to the injunction proceeding, but who are held to have had notice thereof, even though not served personally with said injunction, by virtue of one publication on the same day of said injunction in two local newspapers, when there is no proof that the accused were in the area on that day, or resided therein, or ever made use either habitually or intermittently of said newspapers?

5. Does not the imposition of a fine in excess of $500 against a corporate defendant, without trial by jury, violate rights guaranteed by the Fourteenth and Fifth Amendments in a State where imposition of a fine of such magnitude in any criminal matter is by statute applicable only in non-petty offenses and requires trial by jury?

All of these questions were raised below at length in the Appellate Division of the Superior Court where the hearing is *de novo*.

Constitutional and Statutory Provisions Involved

The applicable United States constitutional provisions are the First, Fifth and Fourteenth Amendments.

Article I, paragraph 19 of the New Jersey Constitution and N.J.S.A. 2A:169-4, 2A:85-7, 2A:85-6 and 2A:10-1. The text of these provisions is set forth at Appendix D.

Statement

Petitioner Jersey City Education Association is the organization of approximately 1,650 school teachers and approximately 35 nurses and 17 attendance officers employed by the Board of Education of the City of Jersey City, New Jersey, and represents those persons in collec-

tive negotiations with the Board and the application of the resulting employment agreement. All individual petitioners are members of the Association and employees of the Board of Education and the first 10 named individuals are also officers and members of the Executive Board of the Association.

The Education Association became the sole bargaining agent as the victor in an election on May 3, 1967, and negotiated and entered into a collective bargaining agreement effective for 1 year from September 1, 1969.

Because of the requirements of the provisions of the state budget law applicable to boards of education, a budget for the school year starting in September must be adopted no later than the preceding February or March; and to meet that deadline the Association submitted its proposals to the Board of Education in October, 1969, but the Board did not commence negotiations until December, 1969. The funds for the operation of the Board of Education are furnished by the City of Jersey City and the Mayor thereof publicly announced that the City could not financially afford to maintain the school system and would close the schools in September, 1970, unless the City received a substantial increase in state aid; in fact the City instituted a suit in the state courts to require the State to make an enormously increased financial contribution to the City in the New Jersey Superior Court, *Robinson* v. *Cahill, et als.*, L-18704-69, which was unsuccessful. Consequently, the Board did not negotiate in good faith and on January 16, 1970, adopted a budget which would allow only an increase of $100.00 a year in teachers' salaries and which would not permit any favorable response to the many other proposals made by the Association such as size of classes, proposed study of a

mental health class, drug abuse and various special courses, etc.

The Association repeatedly during these negotiations requested the presence of the Mayor and City Council of Jersey City, since it was obvious that the Board of Education had had its hands tied by the action of the Mayor and could not negotiate with any free will. This request was denied, and the first opportunity that representatives of the Association had to meet with representatives of the Mayor and the City Council was at a meeting of the Board of School Estimate, which meeting took place on February 11. For their temerity in attending this meeting and in attempting to bring their proposals before the only governmental body which had any authority at all to deal with the proposals of the Association, these representatives of the Association (the Scialli group) were charged and convicted for a violation of the injunctive order.

Pursuant to Chapter 303 of the Laws of 1968 the Association and Board of Education went through sterile procedures of negotiation, mediation and were in fact-finding when the latter was broken up on Sunday, February 8, 1970, by the Board, because it had heard that the Association had that morning voted to discontinue work the next day, Monday, February 9, 1970.

The next morning, Monday, February 9, 1970, the Board filed its complaint and obtained an order to show cause with restraints from the Chancery Division of the Superior Court of New Jersey restraining the Association and the first group of individuals from picketing, striking, participating in, abetting and persuading any persons to strike and to refrain from any act which would in any manner disrupt the lawful and orderly conduct of the

schools; and the Association and those individuals were by order dated February 12, 1970, arrested and charged with violating the restraints by their conduct on February 11, 1970 (when they attended a school Board of Estimate meeting and, consequently, were absent from school) and were required to each post personal bail bonds of $1,000.00; the remaining individuals, who had not been served in the proceedings prior thereto, were charged by an order for arrest dated February 19, 1970, with contempt of court by conduct on February 13th violating the restraints and each was required to post a personal bail bond in the sum of $1,000.00. All personal bail bonds appear to be still in force and effect, having been continued by the trial judge pending appeal. Each order regarding contempt expressly stated:

> "That the contempt here charged is summary and penal and not such as warrants indictment and trial by jury."

After trial without a jury all the accused were on March 10, 1970, convicted of contempt of court except three whose names do not appear in this application. On March 16, 1970, sentences were imposed and on March 18, 1970, separate formal orders finding each petitioner guilty and imposing fines and imprisonment were signed and entered as follows:

(a) Each individual officer and Executive Board member of the Association (the Scialli group) was fined $500.00 and sentenced to three months in the Hudson County Penitentiary, of which one month was to be in custody and the balance of the term suspended and placed on probation for one year commencing with release from custody;

(b) The remaining individuals (the Pagano group) were each sentenced to thirty days in the county jail, twenty days suspended, fined $200.00 each and placed on probation for one year; except Amarato, who was sentenced to thirty days in county jail, fifteen days suspended, fined $250.00 and placed on probation for one year;

(c) The Jersey City Education Association was fined $10,000.00.

A joint appeal was taken from the convictions to the Appellate Division of the Superior Court of New Jersey where review of such cases is *de novo* on the record made below. After hearing oral arg .nent, the Appellate Division on May 21, 1971, filed its Opinion affirming all convictions.

REASONS FOR GRANTING THE WRIT

POINT I

This Court should examine and delineate the ambit of the "right to organize".

It may seem strange that in all the many years of the law of labor relations there is not a single case which looks squarely at the meaning of the right to organize, even in this Court where the constitutional implications of all facets of the employer-employee relationship, either as arising from common law antecedents or statutory modification, whether on a federal or state level have been extensively litigated and determined in innumerable instances. While here and there casual references and *obiter dicta* are found, the issue has never been met

(*International Union U.A.W., A.F.L.* v. *Wisconsin Industrial Relations Board,* 336 U. S. 245 (1945); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Hague* v. *CIO,* 307 U. S. 496 (1939)). The issue has never been squarely raised nor determined not only at the highest level of this Court, but strangely enough in none of the myriad lower federal courts or state courts.

Article I, paragraph 19, of the New Jersey Constitution, adopted in 1947, states as follows:

> "19. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

The right to organize obviously means the right to form an organization. The question then must be answered as to what are the essential attributes of such an organization, and what are such indispensable attributes as will permit such an organization to maintain its existence.

As this Court eloquently stated in *NAACP* v. *Alabama,* 357 U. S. 449, 2 L. ed. 2d 1488, 78 S. Ct. 1163 (1958):

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge* v. *Oregon,* 299 U. S. 353, 364, 81 L. ed. 278, 283, 57 S. Ct. 255; *Thomas* v. *Collins,* 323 U. S. 516, 530, 89 L. ed. 430,

440, 65 S. Ct. 315. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow* v. *New York*, 268 U. S. 652, 666, 69 L. ed. 1138, 1145, 45 S. Ct. 625; *Palko* v. *Connecticut*, 302 U. S. 319, 324, 82 L. ed. 288, 291, 58 S. Ct. 148; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, 84 L. ed. 1213, 1217, 60 S. Ct. 900, 128 A. L. R. 1352; *Staub* v. *Baxley*, 355 U. S. 313, 321, 2 L. ed. 2d 302, 310, 78 S. Ct. 277. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

"The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direction action, *cf. De Jonge* v. *Oregon*, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255, *supra*; *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625, to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. See *American Communication Asso.* v. *Douds*, 339 U. S. 382, 402, 95 L. ed. 925, 945, 70 S. Ct. 674.

"In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."

See also *Brotherhood of Railway Trainmen* v. *Virginia,* 377 U. S. 1 (1964); *United Transportation Union* v. *State Bar of Michigan,* 39 L W 4428 (4/6/71); *NAACP* v. *Button,* 371 U. S. 415 (1963); *United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217 (1967).

The question which must be fairly faced is whether in contemporary society an organization of private employees may achieve meaningful existence, if it is deprived of any form of terminality, when it is involved in a dispute with a public employer. In the State of New Jersey public employees when engaged in a dispute with their employer may bargain, have the services of a mediator, go to fact-finding, which is not binding on either party (N.J.S.A. 34:13A-1 (N. J. Employer-Employee Relations Act)) and if the absolute prohibition which the courts of New Jersey have imposed against strikes by public employees is controlling, public employees' organizations are bereft of any weapon to secure the achievement of their cause. The Supreme Court of New Jersey has made it clear that regardless of a public employer's conduct, adamancy, refusal to engage in good faith negotiation, however the alleged financial inability of the public employer to meet reasonable remands of their employees may have been brought about, even if by defalcations by the officialdom of the public employer, as may very well have been the situation in the case at bar, where members of Jersey City's official family have been convicted in the federal courts of wholesale looting of the City treasury, the employees of that public body may not cease to work and peaceably picket in an endeavor to communicate to the community the nature of their dispute, the reasonableness thereof and solicit the support of the community in an endeavor to convince their employer (in this case the Board of Education) that their

employees have merit to their proposals. *B. of E., Union Beach* v. *N. J. A. E., et al.*, 53 N. J. 29, 247 A. 2d 867 (1968). If such action is prohibited on the part of an organization, the right to organize becomes a meaningless exercise in philology and such an organization must collapse in a relatively short time. The notion that there may be other forms of communication and attempts to enlist support from the community in the absence of a cessation of work and a picket line is to deprecate with the utmost naivete the present contemporary climate in labor relations. That is not to say that only a strike and a picket line are the only effective methods for a labor organization, but absent any other machinery for achieving a solution of a labor dispute with the consequent knowledge on the part of the employer that, however sarcastic and unreasonable its conduct may be, its employees have no recourse other than to quit their employment individually, how can an organization justify and maintain its existence in this field? As a matter of fact, a concerted quitting of jobs, where the employees seek to terminate the employer-employee relationship completely might still run afoul of the kind of injunction issued here.

Although it may seem curious that there are few legal authorities dealing with the meaning and application of the right to organize, the history of labor law demonstrates the answer. This is treated at great length at pages 9 through 25 in our brief before the Appellate Division of the Superior Court of New Jersey. We will simply state here that from the earliest parliamentary enactment making combinations of employees a criminal conspiracy,

> "There can be no doubt, but that all Confederacies whatsoever, wrongfully to prejudice a third Person,

> are highly criminal at Common Law, as were divers Persons confederate together by indirect Means to impoverish a third Person . . ." Hawkins, *Pleas of the Crown,* bk. 1, c. 72 § 2 (1716).

until Francis Place and Joseph Hume managed to secure the passage of the Combination Act of 1824 (5 Geo. 4, c. 95) removing the criminal prohibition against associations of workmen, the development of the law is from one which treated combinations of workers as criminal conspiracies, because these combinations were viewed as attempts to influence the flow of trade or the price of labor or merchandise to the realization that while such combinations might have such an effect; nevertheless, there might be situations where such purposes would be regarded as harmless consequences of a more desirable social purpose, and it was never again doubted that the right to organize brought with it the right to strike as such. Thereafter the sole question was whether in a particular situation that right might be exercised or whether if exercisable, the means were lawful.

The judicial history of the period in England followed the legislative history. From *Rex* v. *Journeymen Tailors of Cambridge,* 8 Mod. 10 (1721), until the Combination Act of 1824, the English courts constantly found an agreement amongst workers to be a criminal conspiracy. Thereafter that theory was abandoned, and the courts began to look at the purposes and conduct of a strike in the particular situation. See Hedges and Wainterbottom, *The Legal History of Trade Unionism,* p. 50 (1930).

American judicial history is parallel. From the *Philadelphia Cordwainers case* in 1806 the English law of conspiracy was adopted. *Commonwealth* v. *Hunt,* 4 Metc. 111 (Mass. 1842) is most significant because there Chief

Justice Shaw equated the right to organize with the right to strike, finding that an essential element of a group of employees formed to further their economic purposes was the right to strike. In considering the legality of the purpose of the strike, *Commonwealth* v. *Hunt, supra,* demonstrates an early acceptance of what every person knows to be the reality of economic life in the employer-employee relationship, to wit, that an organization of employees which does not have the right to strike (absent any other legal compulsion to resolve a labor dispute) is a paper tiger without any real authority for its existence. Logic and semantic dissection may be powerful weapons in a court room; but in the harsh realities of economic life they are recognized only for their physical ingredient, to wit, an aspiration of air, be it hot or cold. Every American is today fully familiar with the long-winded exercises sometimes euphemistically termed "collective bargaining", which leave the stage of rhetoric and ritual only as the terminal date of a contract looms and then only there begins meaningful and effective discussion. The position of the parties in a labor dispute takes form and shape only when the right of the employees to strike reaches the sticking point.

The lower courts in the instant proceeding had not passed upon this question. The Appellate Division of the New Jersey Superior Court suggested that this contention should be examined by the New Jersey Supreme Court. The New Jersey Supreme Court refused certification, and the matter has not received real judicial scrutiny.

Of course one must take cognizance of the immediate question which is always raised when there is a suggestion that public employees have a right to withhold their labor. Granted the non-essentiality of a good deal of the

functions today carried on by public bodies, what about a strike of policemen or firemen? And it is further asserted that conceding the flexibility of school calendars, wherein there are already extended periods of vacation, explainable only by our original agricultural backgrounds rather than for any sound pedagogical reason, so that time lost in such a dispute may be easily made up, security is another matter. The answer, of course, is that very few rights are absolute and that the conditions under which a right may be exercised as well as the manner in which it may be exercised are always subject to judicial scrutiny and balancing. The authorities are legion on the pros and cons of the matter and need not be enumerated here. We are asking this Honorable Court to declare that the right to organize prevents an absolute prohibition on a group's ceasing to work; whether that cessation may be conditioned by exhaustion of various preliminary safeguards, mediation, fact-finding, cooling-off periods, minimum security measures, and the like is another matter. The right of free speech may not be absolute enough to permit one to cry "Fire" in a crowded theatre. It does permit one to crunch popcorn, however annoying this may be to other theatregoers. One thing is certain—that legislative bodies confronted with the right of public employees to cease work in a dispute will find an immediate solution; *e.g.*, arbitration, in those situations where the prospect of an interruption in a public service becomes logically, if not politically, intolerable. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957); *United Steelworkers of America* v. *Woman & Gulf Trans. Co.,* 363 U. S. 574 (1960).

POINT II

The injunctive order was clearly unconstitutional, not only for overbreadth and vagueness in itself, but as interpreted by the courts below, to prohibit constitutionally mandated actions.

The first group of individual defendants, whom we have termed the Scialli group and who are referred to in the proceedings as officers and members of the Executive Board of the Jersey City Education Association, were convicted largely because they attended a meeting of the Board of School Estimate on February 11 in the morning. None of these defendants picketed nor are any other actions by them alleged to have contravened the injunction herein. It will be recalled that the injunctive order was issued on February 9. These individual defendants were not served until February 10. In the afternoon of February 11 the trial court issued an order for arrest of these defendants on the basis of the allegation that they were absent from school without proper excuse and that they could not have been ill, since they were observed at the Board of School Estimate meeting on the morning of February 11 (App. B, p. 10a).

To the contention that these individual defendants were engaged in an activity clearly sanctioned by the New Jersey Constitution, the Appellate Division gave a curious answer: "Simply because these particular defendants may have been at the Board of School Estimate meeting on February 11 and engaged in some form of negotiation did not relieve them of their obligation of performing their duties as teachers or, alternatively, of reporting an expected absence to the appropriate authorities". We say the answer is curious because the first part of the an-

swer alleges a physical impossibility; obviously the teachers could not be at the meeting of the Board of School Estimate and at the same time be in the classroom. As to the second part, while it might have been better policy for the teachers involved to have notified the school authorities that they were going to be at the Board of School Estimate meeting that morning, the school authorities became aware of the fact immediately, because by the afternoon they had already prepared their petition and order for arrest alleging the presence of the teachers at the Board of School Estimate meeting. Furthermore, since all of the schools were closed after 9 A.M., the absence of these 10 individuals hardly can have had the significant effect of keeping open the schools. The overbreadth and overkill aspects of the Court's injunctive order can hardly be more clearly demonstrated than this application of the order to convict the members of the Scialli group. Apparently if February 11 had been a day of religious observance, the Court would nevertheless have found that the absence was part of a concerted strike action. Iy anything demonstrates the determination of the Court to find a violation of the injunctive order, this is it. During months of negotiation the Association had asked that those who were making policy for the City appear at the bargaining table. The Board of Education had taken an unswerving position that the City's precarious financial position permitted a wage increase of only $100. The only opportunity that the negotiators on behalf of the Association had to persuade the City officialdom that there should be a change in their bargaining position was at this Board of School Estimate meeting.

The New Jersey Constitution says that public employees shall have a right to present their grievances and

proposals through representatives of their own choosing. Where should the Association leadership have gone and to whom should they have spoken to make a meaningful presentation of their proposals? And can a conviction be postulated on the fact that before they went they did not obtain permission from the school authorities?

In the first instance, could the school authorities have refused permission?

Secondly, since the schools were closed, was this not an exercise of the extremest futility?

These representatives of their Association were not only exercising their individual rights of free speech and petition, but were exercising essential organizational rights. If they could not carry out their attempt to settle the dispute through discussion, then of course their involuntary servitude as well as those of their colleagues in the Association becomes complete. We then have the situation of a public body meeting with a public employee association and assuming a fixed, firm and unshakable position. A court then issues an order enjoining the employees association and any of its members or representatives from taking any steps which may involve absence from their employment. However those steps are constitutionally mandated and designed to settle the dispute, and even if such steps constituted no interference or at best an infinitesimal interference with the school program, if such order be deemed valid, the association might as well dissolve immediately and its membership abandon any hope of free speech, assembly, or petition.

The Appellate Division obviously shut its eyes to the realities and procedure involved in settling a dispute. It is a commonplace of collective bargaining that where parties have reached a stand-off that third persons be brought into the controversy, who because of their standing either

as superiors or their position of authority in the community or because of their reputation for impartiality and fairness will permit movement from the intransigence of the immediate persons involved in the dispute. Boards of school estimate have frequently resolved school disputes by making available moneys for school budgets that had previously not been available, and it would certainly have been a complete dereliction on the part of the negotiating team of the Association not to have approached the Board of School Estimate in an endeavor to settle the dispute which was causing the schools to be shut. As applied here, there can be no question that not only does the injunctive order violate the New Jersey Constitution, but fundamental rights of free speech, petition, assembly and association. *Near* v. *Minnesota,* 283 U. S. 697 (1931); *NAACP* v. *Alabama, supra; Carrol* v. *President and Com. of Princess Anne,* 393 U. S. 175 (1968); *Pickering* v. *Board of Education,* 391 U. S. 563 (1968); *Roth* v. *Board of Regents of State Colleges,* 310 F. 2 972 (D. C. Min. 1970).

POINT III

The injunctive order was clearly unconstitutional as interpreted to require proof of non-guilt by the defendants.

The rationale of the Appellate Division was that the fact of the absence of this group of teachers from the class room, even though there was no proof that they had picketed or attempted in any way to prevent anyone from entering the schools, demonstrated that they had violated the Court's order because (a) there was a strike in progress, and (b) these defendants were officers of the

Association whose members had voted for the strike. The Appellate Division stated that such absence "without excuse or explanation in violation of school regulations established beyond question their participation directly or indirectly in the strike." Exactly what is meant by "indirect" guilt in a criminal contempt proceedings must be a novel concept in our jurisprudence. Where guilt beyond a reasonable doubt must be established, indirection is hardly a convincing or persuasive measure. Apart from this, in violation of the Fourteenth, First and Fifth Amendments the Court here establishes a presumption of guilt by virtue of association and throws the burden of proving non-guilt on the defendants. Unless teachers have now been relegated to a second-class type of citizenship, this procedure is obviously unconstitutional.

Garrity v. *New Jersey,* 385 U. S. 495, 500 (1967) reversed 44 N. J. 259, 208 A. 2d 146 (1965) and held that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967) and *Spevak* v. *Klein,* 385 U. S. 511 (1967), respectively, held that teachers and lawyers have constitutional rights which States must respect. *Pickering* v. *Bd. of Education, supra.*

POINT IV

Notice of the issuance of the injunction was unconstitutionally imputed to the Pagano group in violation of the Fourteenth and First Amendments.

The Appellate Division, mindful of the fact that the second group of defendants known as the Pagano group had not been served with process in the proceedings, and

having stated the law correctly with respect to actual notice of the issuance of an injunction being required or the demonstration of such facts from which notice may be imputed beyond a reasonable doubt, found itself unable to cite an authority to fit the facts in question. It cited *Garrigan* v. *U. S.*, 163 F. 16 (C. C. A. 7, 1908, cert. denied 214 U. S. 514 (1909). In that case the court clearly held that notice could not be imputed from the mere fact of the advertisement of the injunctive order in a newspaper publication. Thus, the Court stated:

> "We are of opinion that each of the findings is unsupported, in any admissible view of the facts so established. The finding that the plaintiff in error had 'full knowledge of the injunction'—a fundamental requisite for either charge of contempt—rests alone on the alleged publicity of the issuance, through newspapers and notices thereof which were posted on the wagons intercepted by the mob. No testimony appears of word or action on the part of the plaintiff in error, or in his hearing, in reference to the injunction; nor that his attention was directed to the wagons, their contents, or any notices thereon. He is clearly entitled to the benefit of the 'presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf' ".

In the instant case there was one insertion of the advertisement in two New Jersey newspapers, the Jersey Journal and the Hudson Dispatch on February 10. There was no proof in the record to show that any of the teachers habitually read these papers, that they lived in the area where these newspapers are circulated, or that they had discussed the issuance of the injunction. They were

observed picketing on February 13, and this is the sole demonstration of the conduct with respect to the strike. There is not a single case in New Jersey or anywhere else which states that knowledge of a strike and picketing activities are the equivalent of knowledge of the issuance of a court injunction and its contents. There is not a scintilla of evidence to show that while they were picketing that any school authority or court officer informed them that their picketing was in violation of a court order. The Appellate Division was obviously hard pressed under these circumstances to find guilt beyond a reasonable doubt. Again the court found them guilty by association because they were members of a union which had been negotiating for a long time and which driven by sheer frustration over the adamancy of the Board of Education's position found itself compelled to act. It is clear beyond the shadow of a doubt that not only was there not established any knowledge of the court order forbidding the strike, but no knowledge of the existence of any court proceeding wtih respect to the strike. So far as the Pagano group is concerned the finding of guilt here is barren of any support whatsoever, and their conviction is a barefaced demonstration of the court's determination to find a violation of its injunctive order, no matter what the actual fact and circumstances were.

It must be remembered that they were found guilty because of their actions on February 13. The court's assertion that there was wide dissemination of the news of the strike and of the order restraining it is undoubtedly colored by the fact that the dispute went on for a long period after February 13, but the defendants cannot be held guilty for actions committed on February 13 because of acts subsequent thereto. Sitting in judgment more

than a year after the event, the Appellate Division may very well have been misled by the time sequence and have overlooked the rapidity with which th school authorities rushed in to prosecute the teachers. Obviously, however, this is no excuse or substitute for legal proof. Criminal prosecutions are not the equivalent of collective bargaining or negotiation, and if the school authorities had used the energy and the enthusiasm with which they went about the prosecution in negotiations, they might have achieved a more felicitous result.

POINT V

Equal protection of the laws and due process guaranteed by the Fourteenth Amendment were denied the petitioners by the imposition of a fine of $10,000 on the association when the general maximum fine for misdemeanors in New Jersey is $1,000 and for petty offenses $500.

In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), Duncan was convicted by a judge, after denial of trial by jury, of simple battery, for which the statute fixed the maximum penalty at 2 years imprisonment and a $300 fine. This Court held that denial of trial by jury where the jail sentence could be as high as 2 years was a violation of Duncan's right to due process guaranteed by the Fourteenth Amendment. The sentence actually imposed on Duncan was 60 days in the parish prison and a fine of $150. However, this Court decided that the maximum authorized sentence is the yard stick by which to test whether the offense for which the appellant was tried was a "petty offense" or a "crime". Accordingly, this Court held that:

> "* * * the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." (At p. 149 of 391 U. S.)

And further on this Court said:

> "In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine." (P. 161 of 391 U. S.)

Learning from this the dividing line between "petty offenses" and "crimes" the New Jersey legislature within 5 weeks following this Court's decision in *Duncan* had enacted a law denominating "disorderly conduct" as a "petty offense" and reducing the maximum penalties from 1 year to 6 months in jail and the fine from $1,000 to $500 (New Jersey Laws, 1968, c. 113; N.J.S. 2A:169-4).

In *Bloom* v. *Illinois*, 391 U. S. 194 (1968), this Court dealt directly with a conviction of criminal contempt in a state court. Illinois law provided no maximum limit to punishment on convictions of criminal contempt. Bloom's request for trial by jury was denied and after conviction upon trial before a judge he was sentenced to imprisonment for two years. Under the rule of *Cheff* v. *Schneckenberg*, 384 U. S. 373 (1966), when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, this Court will look to the penalty actually imposed as the best evidence of the seriousness of the offense. Accordingly, this Court held that Bloom was entitled to right to trial by jury and it was constitutional error to deny him that right.

The New Jersey Supreme Court has stated in *State* v. *Owens*, 54 N. J. 153, 254 A. 2d 97 (1969), that:

> "The maximum punishment for a petty offense is below that authorized for a crime * * *".

And in New Jersey the general penalty for crimes of the grade of misdemeanor is a maximum fine of $1,000 or imprisonment, or both (N.J.S. 2A:85-7) and even crimes of the grade of high misdemeanors generally are subject only to a maximum fine of $2,000 or imprisonment, or both. Thus, if an individual is tried for a "petty offense" in New Jersey, the fine portion of his punishment cannot exceed $500; if he is found guilty of a crime of the grade of misdemeanor, his maximum fine is $1,000; and if he is found guilty of a higher misdemeanor, his maximum fine is $2,000, in addition to possible jail sentences.

But the Supreme Court of New Jersey now asserts the courts of New Jersey have the right to try criminal contempts either with or without a jury, and that when tried without a jury the offense is merely a "petty offense", regardless of the penalty actually imposed!

If this be so, an individual tried for contempt without a jury can be sentenced to a maximum fine of $500, whereas it is claimed in the present case that a corporation tried for contempt without a jury can be fined a maximum amount unlimited except by the discretion of the court; e.g., $10,000; $20,000; $30,000; etc. This is not equal protection of the laws, or, as it has sometimes been said, the protection of equal laws. Nor is it due process. This is arbitrary or discriminatory rule, since whether a corporation accused of contempt of court gets the protection of trial by jury depends in New Jersey upon the discretion and judgment of the judge signing the order

to show cause in contempt, and there is no known or declared standard which a judge shall follow in applying such discretion. We are not aware of any case in New Jersey laying down a guide line, nor has the very voluminous rule book promulgated by the New Jersey Supreme Court, consisting of some 500 pages, laid down a guide line or any limits upon the discretion of the judge.

The Supreme Court of New Jersey has said that in addition to being a "petty offense" contempt is at the same time a crime preserved by the omnibus section of the State Crimes Act which provides that:

> "Assaults, batteries * * *, deceits and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors." (N.J.S. 2A:85-1)

The New Jersey Supreme Court has ruled that contempt falls within the phrase "all other offenses of an indictable nature at common law" of this section of the statute and therefore contempts may be prosecuted as crimes. *In re Buehrer,* 50 N. J. 501, 236 A. 2d 592 (1967). If the alleged offender is indicted the maximum fine (after trial by jury) would be, as noted above, $1,000 applicable equally to an individual ("person") or to a corporation ("person"). The Supreme Court of New Jersey by authorizing and approving imposition of fines for contempt of court upon corporations tried without a jury in excess of $500 has therefore found a unique way around the guaranties of the Fourteenth Amendment for equal protection of the laws, and due process.

If, as the New Jersey courts are currently holding criminal contempt may be punished by a fine whose maximum is limited only by the court's discretion, then by a

parity of reasoning, it can be punished by a jail sentence whose maximum is limited only by the court's discretion.

Interestingly enough another division of the Appellate Division of the New Jersey Superior Court in *State* v. *Janiec,* 25 N. J. Super. 197, 95 A. 2d 762 (N. J. A. D. 1953), equated the punishment for criminal contempt with the punishment for misdemeanors, and held that the sentences for contempt must not exceed those provided by the Legislature for misdemeanors. Unfortunately, the New Jersey Supreme Court by refusing certification in this case did not resolve the conflict between the different branches of the Appellate Division, and this Court should pass upon this aspect of the matter involving clear federal constitutional problems.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

EMIL OXFELD,
ABRAHAM L. FRIEDMAN,
ROTHBARD, HARRIS & OXFELD,
and
PHILIP FEINTUCH,
Attorneys for Petitioners.

[APPENDICES FOLLOW]

APPENDIX A

Order of Supreme Court, Denying Petition for Certification

(Filed—July 7, 1971.)

SUPREME COURT OF NEW JERSEY

C-552 SEPTEMBER TERM 1970

IN RE:

JERSEY CITY EDUCATION ASSOCIATION, *et als.*,

Defendants-Petitioners.

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

IRVING B. ZEICHNER
Acting Clerk of the Supreme Court

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1251-69

IN THE MATTER OF

JERSEY CITY EDUCATION ASSOCIATION, LOUIS T. SCIALLI, THOMAS FAVIA, SARAH GROCHOW, GAIL ROMANOWSKI, DORIS E. FILLIPPONE, ETHEL P. BROWN, DANIEL CUPO, GAIL HALL, BARBARA SCHNEIDER, and ROBERT ROGENSTEIN, individually and as Officers and Members of the Executive Board of Jersey City Education Association, and FRANK AMARATO, JAMES AUMACK, MARY DAVIS, MARGARET DEL PRETE, DIANNE FERRARA, BERNICE MACCHIA, NEIL PAGANO, MICHAEL WARJANKA, MAE MCCOMB, MYRA DANIEL, CHARGED WITH CONTEMPT OF COURT,

Defendants-Appellants.

Argued March 22, 1971; supplementary briefs submitted March 31, 1971 and April 14, 1971—Decided May 21, 1971.

Before JUDGES CONFORD, KOLOVSKY and CARTON.

On appeal from Superior Court, Chancery Division, Hudson County.

Appendix B

MR. EMIL OXFELD argued the cause for appellants (MR. PHILIP FEINTUCH, attorney).

MR. NORMAN L. KLINE, Assistant Prosecutor, argued the cause for respondent (MR. GEOFFREY GAULKIN, Hudson County Prosecutor, attorney).

The opinion of the court was delivered by
CARTON, J.A.D.

In these consolidated appeals the Jersey City Education Association (Association) and 20 individual member teachers challenge the validity of summary convictions for contempt of court for violating a restraining order of the Chancery Division issued February 9, 1970 prohibiting them from engaging in a strike against the Jersey City Board of Education.

All defendants argue that the injunctive order was unconstitutionally issued. One group of defendants, comprised of officers and members of the Executive Committee of the Association, argue that the proofs fail to establish their violation of the order. The second group, consisting of members at large, although making no claim that their acts were not violative of the order, argue that actual notice of the February 9 restraining order was not established against them. The Association advances the additional argument that the amount of the fine levied against it was in excess of that constitutionally permissible as punishment for summary contempt.

A summary of the chronological background leading to the strike and the proceedings which arose from it shed light on the legal issues involved.

Negotiations between representatives of the Board of Education and the Association began about December 1,

1969, the teachers having submitted their original proposals to the Board late in October or early November. Some ten meetings of the parties took place thereafter—the negotiations principally concerning the issue of salary.

On January 15, 1970, Mayor Whelan of Jersey City delivered what was designated as the "State of the City Address" in which he set forth the problems the City faced in financing public education and related services. He indicated that the schools would be closed the following September unless financial assistance from the State was forthcoming. The next day the Board of Education published the proposed school budget limiting the teacher salary increase to $100 across the board.

An impasse in negotiations between the Board and the teachers was reached on January 16, 1970 due in large measure to the Board's statement that the $100 increase was the final offer and also because of a failure to agree on issues concerning size of classes, a proposed study of a mental health class, drug abuse and various special courses. When a mediator's efforts to resolve the dispute were unsuccessful, the State Public Employees' Relations Commission sent a list of names of fact finders to the Board which indicated acceptance of this list in early February.

After various meetings of the parties in which the Association unsuccessfully sought to have the Board of Estimate defer adoption of the proposed budget until the issues in dispute were resolved and while the fact finding group remained in session, the members of the Association voted on Sunday afternoon, February 8, to strike. Negotiations with the fact finding group immedi-

ately broke off when Scialli, president of the Association, returned from the meeting and announced that the teachers had voted to strike.

The following day (Monday, February 9) the Board of Education filed a complaint alleging in essence that defendant Association and the group consisting of Louis T. Scialli, president; Thomas Favia, first vice president; Marion Winds, second vice president; Sara Grochow, financial secretary; Gail Romanowski, corresponding secretary; Doris Fillippone, recording secretary; and Ethel P. Brown, Daniel Cupo, Gail Hall, Robert Rogenstein and Barbara Schneider, members at large of the Executive Board, advocated and called a strike by the public school teachers of Jersey City. On the basis of defendants' concession that as of February 9, 1970 such a strike existed, Judge Lynch that day entered a temporary restraining order until further order of the court and an order to show cause why an injunctive order should not be entered.

The restraining order was addressed to defendant Jersey City Education Association and the individual defendants, "their associates, their servants, agents or employees or any individual acting in concert with or in combination with them." It restrained them

> a. From picketing about, near or on schools or school grounds or areas about the public schools of the City of Jersey City.
>
> b. From striking, participating in any strike, adjoining [sic], abetting, counselling, persuading any person or persons or any teacher or employee of the plaintiff to strike or to remain away from their

work for the purpose of striking or from interferring with any person or persons, student or students desiring to enter the Public Schools of the City of Jersey City.

c. To refrain from any act which will in any manner disrupt the lawful and orderly conduct of the schools and the education of the public school children of the City of Jersey City or of interferring in any manner with the welfare and safety of the public school students. From ordering, commanding, directing, assisting, abetting, counselling, persuading or suffering in any manner whatsoever any person or persons who attempt to commit or who commit any of the aforesaid acts.

When issuing the restraining order the court announced that the merits of the dispute were not involved and that the court was taking such action because public employees have no legal right to strike. The court also made it clear that the restraining order was an order of the court. Copies of the complaint and affidavits were directed to be served upon the named defendants. The Board was also directed to publish the order in a prominent manner on February 10 "by way of display advertising" in the "Hudson Dispatch" and "Jersey Journal."

On February 10 each named defendant was served with the February 9 restraining order. On February 11, on the basis of affidavits that alleged that each of these individual defendants continued his strike tactics and absented himself without excuse or authority from school; that none of them was ill on that day, having attended a meeting of the Board of School Estimate that morn-

ing; and that a number of pickets were stationed in front of various Jersey City schools after service and publication of the order, Judge Lynch issued an order of arrest charging these defendants with violating the restraining order. After presenting themselves to the court voluntarily, they were released on their own bond of $1,000 each.

On the following February 19, the second group of defendants, comprised of ten teachers of Public School No. 12, were ordered to be arrested for the violation on Friday, February 13 of the February 9 restraining order. These defendants were also released on bail of $1,000. This second group of defendants is comprised of the following teachers: Frank Amarato, James Aumack, Mary Davis, Margaret Del Prete, Dianne Ferrara, Bernice Macchia, Neil Pagnano, Michael Warjanka, Mae McComb and Myra Daniell.

A consolidated summary trial of all defendants for contempt of court was conducted by Judge Lora in which Lawrence P. Brady, Esq. was designated to prosecute the contempts. The prosecution offered considerable evidence, which will be referred to hereafter, in support of the charges. The defense recalled one of the State's witnesses concerning an article appearing in the newspaper but offered no other evidence. None of the defendants testified. It was conceded that the individual defendants of the first group, whether in their respective capacity or individually, as well as defendants New Jersey Education Association and Jersey City Education Association, were properly served on February 10 with the order to show cause, the complaint and the temporary restraining order.

Appendix B

After the prosecution rested its case, Judge Lora granted motions for acquittal as to defendant Gould and New Jersey Education Association. He also granted a dismissal as to defendant Marion Winds, a vice president of the Jersey City Education Association, at the conclusion of the case. He found all other defendants guilty of violating the restraining order.

The officers and members of the Executive Board of the Teachers' Association were sentenced to three months in County Jail, two months suspended, fined $500 each and placed on probation for one year. The second group of defendants, with the exception of Frank Amarato, was sentenced to 30 days in County Jail, 20 days suspended, fined $200 each and placed on probation for one year. Amarato was sentenced to 30 days in County Jail, 15 days suspended, fined $250 and placed on probation for one year. Defendant Jersey City Teachers Association was fined $10,000.

I.

All defendants contend that the February 9, 1970 restraining order was issued contrary to the provisions of the New Jersey Constitution.

We overlook the fact that the validity of a restraining order is justiciable only on appeal from the order and not from an adjudication for contempt thereof. *In re Tiene,* 17 N. J. 170 (1954). On the merits of the question presented, the law is contrary to defendants' assertion. *Delaware River and Bay Authority* v. *International Organization, etc.,* 45 N. J. 138 (1965); *Board of Education Borough of Union Beach* v. *N.J.E.A., et al.,* 53 N. J. 29 (1968); *In re Block,* 50 N. J. 494 (1967); *In re Ruth*

Appendix B

Buehrer, et al., 50 N. J. 501 (1967). Any suggestion that this conclusion should be re-examined in light of the right to "organize" should be addressed to the Supreme Court.

II.

Defendants next argue that there was no proof beyond a reasonable doubt that there were knowing violations of the restraining order.

As to the first (Scialli) group, notice of the restraining order is not in issue. These defendants, all officers, or members of the Executive Board of the Association, contend only that there is no proof that absence from school was pursuant to a strike plan or other concerted activity. They also argue that the attendance records of defendants were improperly admitted. Defense counsel stipulated as to what the contents of the attendance books were but refused to stipulate the meaning of the symbols used in them or any conclusions to be gleaned therefrom.

Francis McCarthy, Assistant Superintendent in Charge of Personnel, testified as to the existence of a standard operating procedure requiring all teachers to sign or report in. On the basis of this procedure records were maintained of teaches present or absent.

Principals of individual schools kept daily information sheets showing actual attendance and absences. This information was consolidated in a summary report prepared under McCarthy's supervision. The attendance records established that all individual defendants of both groups (with some exceptions as to certain individual dates) were generally absent from February 9 to March 3 without explanation or excuse. He testified further that although the Jersey City school system had a teaching staff of

1743 and the normal absence rate was no more than ten percent, during the period from February 9 to March 3 the total teachers present on any one school day ranged between 288 and 400. During this period all schools were open each school day, but closed shortly after 9 A.M. due to teacher absences.

We are satisfied that the attendance records were properly admitted into evidence and that they warrant the inference that all individual defendants absented themselves from school pursuant to the strike activity. Simply because these particular defendants may have been at the Board of Estimate meeting on February 11 and engaged in some form of negotiation did not relieve them of their obligation of performing their duties as teachers or alternatively of reporting an expected absence to the appropriate authorities.

Such evidence of absence from school without excuse or explanation in violation of school regulation, coupled with all the other evidence, including the fact that a union strike was in progress and that these defendants occupied executive positions in the Association whose members voted the strike, established beyond question that all of these individual defendants, as well as the Association of which they were officers, were participating directly or indirectly in the strike, and aiding and abetting it in violation of the restraining order.

As to the second group, the teachers of P.S. 12 who were charged with violating the restraining order on February 13, the primary issue is the adequacy of notice.

One cannot be found guilty of contempt of a labor injunction unless it is shown that he acted with knowledge

of the injunction. However, it is not necessary to prove formal service on the individual. Actual notice of its existence and its contents is sufficient. Although actual knowledge must be established, it may be inferable from the facts. See *Garrigan* v. *United States,* 163 F. 16 (7th Cir. 1908), *cert.* denied 214 U. S. 514 (1909). See also, 51B *C.J.S., Labor Relations,* § 988; Annotation, "Contempt-Injunction-Nonparty," 15 A.L.R. 386, 400 (1921); 48 *Am. Jur.* 2d Labor and Labor Relations, § 1527.

The question before us is whether the record is sufficient to justify the conclusion beyond a reasonable doubt that these teachers acted with knowledge of the restraining order. We are satisfied that it does.

Knowledge may be inferred from the circumstances surrounding the violation of the order. From the stipulation of counsel it appears that these defendants were members of the union. Their representatives had been negotiating with representatives of the Board of Education for many weeks prior to the calling of the actual strike on February 8. The restraint was issued on February 9 (Monday). The proofs showed that there was wide dissemination of news of the strike and of the order restraining it, and that the order was published in its entirety in full-page displays in both the "Hudson-Dispatch" and the "Jersey Journal," the principal local dailies circulated in Jersey City. General news reports of the strike continued throughout the week of February 9.

Julia Barnes, principal of P.S. 12, testified that on February 13 several of these defendants, not particularly identified came into her office and left self-addressed envelopes so that their pay-checks could be mailed to them.

She observed all of the defendants in this group standing or walking around in front of the entrance of that school from about 8:15 A.M. to 8:40 A.M. on that same day and testified that they did not report that day for the purpose of teaching. Although she did not see any of these defendants actually carrying a sign that day, she described their activity as picketing.

The inescapable inference from all the circumstances is that these defendants were not only aware of the strike but that they were also familiar with the existence and contents of the court order whose proscriptive terms extended to all members of the union. These defendants, as teachers and members of the striking Association, had a strong economic stake in the outcome of the lengthy negotiations which led up to the strike. There was wide dissemination in the news media of the strike and specifically of the general tenor of the restraining order. There is no reasonable doubt that these defendants had actual notice that they were restrained from striking, or aiding or abetting in the strike in any way.

Finally, in the exercise of our appellate function we concur with the penalty as imposed against each individual defendant.

III.

Defendant Association advances the further contention that the $10,000 fine levied against it exceeds that authorized by law in a summary criminal contempt proceeding such as this. The principal basis for this contention is that the Legislature, in adopting N.J.S.A. 2A:169-4, "has clearly specified the maximum penalty which may be assessed in non-indictable and non-jury cases as being

six months in jail or by a fine of not more than $500." That section, as it was amended in 1968, reads:

> Except as otherwise expressly provided, a person adjudged a disorderly person shall be deemed to have been guilty of a petty offense and shall be punished by imprisonment in the county workhouse, penitentiary or jail for not more than six months, or by a fine of not more than $500 or both. (L. 1968, c. 113, §1)

It should be noted that this provision does not purport to prescribe the punishment for all petty offenses. It is simply an amendment to the general punishment section of the disorderly persons statute. Adopted in response to the holding of the United States Supreme Court in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), its apparent purpose is to insure that all disorderly persons offenses may be tried by the court without a jury.

The other sections of the act list the various offenses prohibited under the category of disorderly persons. Contempt of court is not among those listed. Nor does the Disorderly Persons Act refer to contempt of court regarding the punishment which may properly be imposed for the commission of that offense. The effect of N.J. S.A. 2A:169-4 is merely to prescribe the limits of punishment for the petty offense of being a disorderly person.

Compare the inclusive language of N.J.S.A. 2A:85-1 which provides "all other offenses of an indictable nature at common law and not otherwise expressly provided by statute, are misdeameanors"; see too N.J.S.A. 2A:10-1 which, after defining what constitutes contempt of court,

contains this proviso: "Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt."

Consequently, we do not interpret N.J.S.A. 2A:169-4 as expresive of a legislative intention to limit or specify the maximum penalty which could be imposed for all petty offenses and particularly contempt of court. Nor do we read *In re Buehrer,* 50 N. J. 501 (1967), as adjudicating that summary contempt constitutes a disorderly persons offense. The following language of the *Buehrer* opinion does not mandate the conclusion urged by defendants:

> We have not passed upon the outer limits of punishment with respect to the offenses below the grade of crime. As stated above, the Legislature authorized a year's imprisonment and a fine of $1,000 for a disorderly persons offense. *The amount of the fine presents no problem.* Whether a jail term for a year exceeds constitutional limits may be debatable. No case in our State has dealt with that question. An authorized maximum of six months has been upheld. * * * (emphasis added) (*Id.* at 519).

In view of our conclusion that the disorderly persons statute does not apply to contempts of court, we need not consider the State's further argument that the term "person" as used in that statute refers only to persons individually and was not intended to protect corporations or organizations of persons. *Cf. Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936), which considers whether a corporation must be treated as a person and entitled to due process of law and equal protection.

Appendix B

We also do not read the *Buehrer* case to set the outer limits of punishment for all summary contempt convictions. *Buehrer* involved individuals not a corporation. The decision represents a limitation on the inherent jurisdiction of the court in assessing the maximum penalty for a violator subject to both a fine and a term of imprisonment. The court was concerned not with the amount of the fine ("The amount of the fine presents no problem," at p. 519), but with the possible duration of the prison term.

We are not persuaded that *Buehrer* intended to fix the maximum fine in situations where imprisonment was impossible or to hold that a fine in excess of the $1,000 imposed on some defendants in that case may not be assessed against a corporate defendant because it would violate the concept of the "petty offense" limitation. The line of demarcation between "petty offense" and "criminal prosecution" has been equated with the right of trial by jury. See *Frank* v. *U. S.*, 395 U. S. 147, 148 (1969). Under *Bloom* v. *Illinois*, 391 U. S. 194, 198 (1968), contempt of court must be denominated a petty offense unless the punishment makes it a serious offense.

We observe that the federal statutes do not fix the limits (except in certain cases) for punishment for contempt; nor do they distinguish between those contempts which should be classified as petty or serious. In considering the problem the federal courts have adopted a hindsight approach as the criterion.

> Where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the offense. (*Frank* v. *U. S.*, *supra* at 149)

Appendix B

Both *Bloom* and *Frank* considered the consequences of a jail sentence in contempt cases. In *Bloom,* a sentence of two years imprisonment for contempt after trial without a jury was held to be a "serious" offense requiring a trial by jury. In contrast, *Frank* upheld a conviction after trial without a jury as being a petty offense where defendant was given a suspended sentence and placed on probation for three years.

In *Rankin* v. *Shanker,* 23 N. Y. 2d 111, 242 N. E. 2d 802 (Ct. App. 1968), the court considered whether a fine of $10,000 per day or one fifty-second of the total amount of annual membership dues "whichever is the lesser" (provisions setting this penalty are contained in the Taylor Law—Jud. Law. § 751, subd. 2, par. [a]), render the contempt a "serious" crime within the meaning of *Bloom* v. *Illinois, supra.*

> • • • The determination, whether it is serious or petty under the decisions, turns not on the amount of the fine which may be imposed but solely on the length of prison sentence. (See Ex parte Wilson, 114 U. S. 417, 428, 5 S. Ct. 935, 29 L. Ed. 89; People v. Bellinger, 269 N. Y. 265, 271, 199 N. E. 213, 216; Matter of McKinney v. Hamilton, 282 N. Y. 393, 397, 26 N. E. 2d 949, 951, 127 A. L. R. 1283). Consequently, as the cases reveal the fine, even though sizeable in amount, furnishes no valid criterion for the defendants' claim that the contempt charged against them constitutes a serious crime. Further, even if the amount of the permissible fine had any relevance, the fine—which in the last analysis must be borne by the union membership (see e.g., Martin v. Curran, 303 N. Y. 276,

281, 101 N. E. 2d 683, 686)—is actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt. *Id.* at 807-808.

We also note that in *United States* v. *United Mine Workers of America,* 330 U. S. 258 (1946), the Court held that the union had no right to a trial by jury despite a fine of $700,000 (reduced by the Court from $3½ million). However, the "right to trial by jury" was argued in terms of the right as granted under § 11 of the Norris-LaGuardia Act and not under the equal protection or due process clauses. The Supreme Court concluded the corporate defendant was properly tried without a jury.

The Court in *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), denied Holland's Furnace's petition for *certiorari* (381 U. S. 924 (1965)) despite a $100,000 fine after trial without a jury, but granted Cheff's individual petition arising from that same action so as to determine if he had been denied his right to a jury trial. Cheff had been sentenced to six months imprisonment. The Court upheld his conviction.

In its latest pronouncement, the Supreme Court has that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin* v. *New York,* —— U. S. ——, 26 L. Ed. 2d 437, 440 (1970).

Our research has disclosed no case holding that a conviction which could result only in the imposition of a money fine, regardless of amount, and not in imprisonment, gives rise to a right to a jury trial—or makes a "petty" offense a "serious" one.

Appendix B

Since *Bachrach*, as Judge Lora observed, "was concerned only with the question of the permissible limits of non-jury proceedings and punishment of individuals, and not of a union or association such as here involved," we are not bound by the limitation prescribed in that case. We have already noted that there exists no limitation of a legislative nature.

Unlike union officers, the union itself cannot be jailed for contempt. On the other hand, the citation of all striking members individually and the invocation of plenary proceedings as to each present an impracticable alternative method of vindicating the public wrong committed by willful defiance of the order. We observe also that the sting of a $500 or $1,000 maximum fine, even on a daily basis, would not, in all probability, serve as a deterrent to a large union calling a strike of public employees.

We are of the opinion that corporations are sufficiently dissimilar to individuals to warrant the imposition of a fine exceeding $1,000 in a summary contempt proceeding. A greater fine does not transform the contempt from a petty to a serious offense and would not require the incidents of indictment and trial by jury. Consequently, a fine, limited only by reasonableness, may be imposed against a corporate defendant in a summary contempt proceeding. The fine imposed against defendant Association by the trial court was a proper one under the circumstances of this case. We concur in that sentence.

All pending stays are vacated. Fines are to be paid forthwith, if not already paid. Jail terms shall be served commencing July 12, 1971.

Affirmed.

A True Copy
Mortimer G. Newman, Jr.
Clerk

APPENDIX C

Order of Honorable William J. Brennan, Jr.

SUPREME COURT OF THE UNITED STATES

NO. A-55, OCTOBER TERM, 1971

JERSEY CITY EDUCATION ASSOCIATION, *et al.*,

Petitioners,

vs.

NEW JERSEY

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners and the response of counsel for the respondent in opposition thereto,

IT IS ORDERED that the execution of the judgment and mandate of the Superior Court of New Jersey, Appellate Division, in the above-entitled cause be, and it is hereby, stayed, pending the filing of a petition for a writ of certiorari on or before August 15, 1971. Should such a petition be so timely filed, this stay is to continue pending this Court's action on the petition. If the petition for a writ of certiorari is denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to remain in effect pending the issuance of the mandate of this Court.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States.

Dated this 23 day of July, 1971.

APPENDIX D

New Jersey Constitution and Statutes

N. J. Constitution, Art. 1, Par. 19:

> "Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

N. J. S. A. 2A:10-1:

> "The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:
>
> "a. Misbehavior of any person in the actual presence of the court;
>
> "b. Misbehavior of any officer of the court in his official transactions; and
>
> "c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.
>
> "Nothing contained in this section shall be deemed to effect the inherent jurisdiction of the superior court to punish for contempt."

N.J.S.A. 2A:85-6:

> "Any person found guilty of a crime which by statute is declared to be a high misdemeanor, and

for which no punishment is specifically provided, shall be punished by a fine of not more than $2,000, or by imprisonment for not more than 7 years, or both."

N.J.S.A. 2A:85-7:

"Any person found guilty of a crime which by any statute is declared to be a misdemeanor, and for which no punishment is specifically provided, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 3 years, or both."

N.J.S. 2A:169-4:

"Except as otherwise expressly provided, a person adjudged a disorderly person shall be deemed to have been guilty of a petty offense and shall be punished by imprisonment in the county workhouse, penitentiary or jail for not more than 6 months, or by a fine of not more than $500.00 or both."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. A-55~~

71 - 226

JERSEY CITY EDUCATION ASSOCIATION, LOUIS T. SCIALLI, THOMAS FAVIA, SARAH GROCHOW, GAIL ROMANOWSKI, DORIS E. FILLIPPONE, ETHEL P. BROWN, DANIEL CUPO, GAIL HALL, BARBARA SCHNEIDER and ROBERT ROGENSTEIN, individually and as Officers and Members of the Executive Board of the Jersey City Education Association, and FRANK AMARATO, MARY DAVIS, MARGARET DEL PRETE, DIANNE FERRARA, BERNICE MACCHIA, NEIL PAGANO, MICHAEL WARJANKA, MAE McCOMB, MYRA DANIEL,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
POINT I—The State's right to prohibit strikes by public employees is not violative of petitioners' rights under the First and Fourteenth Amendments, and does not present a substantial federal question for examination of the right to organize	4
POINT II—The injunctive order was not unconstitutional for overbreadth and vagueness and did not prohibit constitutionally mandated actions	9
POINT III—The findings of the trial Court that petitioners had violated the injunctive order was supported by the evidence and presents no constitutional question	11
POINT IV—Each defendant below had adequate notice of the order to show cause	12
POINT V—Equal protection of the laws and due process guaranteed by the Fourteenth Amendment were not denied petitioners by the imposition of a fine of $10,000 on the New Jersey Education Association and the Court below was not limited to the maximum fine set forth in N.J.S. 2A:169-4	16
CONCLUSION	19

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Block, In re, 50 N. J. 494 (1967) 4, 12

Bloom v. Illinois, 391 U. S. 194 (1967) 16, 17

PAGE

Board of Education v. New Jersey Education Ass'n., et al., 53 N. J. 29, 247 A. 2d 867 (1968) 4-6

Buehrer, In re, 50 N. J. 501 (1967) 12, 14, 17

Cheff v. Schnackenberg, 334 U. S. 373 (1966) 17

Cross Co. v. United Automobile Workers, 377 Mich. 202, 139 N. W. 2d 694 (1966) 14

Cunningham v. Maroney, 397 F. 2d 724 (3rd Cir. 1968), cert. den. 393 U. S. 1045 (1969) 11

Delaware River and Bay Authority v. International Organization of Masters, Mates and Pilots, 45 N. J. 138, 211 A. 2d 789 (1965) 4, 6, 8

Donevero v. Jersey City Incinerator Authority, 75 N. J. Super. 217, 182 A. 2d 596 (Law Div. 1962), rev'd on other grounds 4, 5

Frank v. United States, 395 U. S. 147 (1968) 17

Garrigan v. U. S., 163 F. 16 (7th Cir. 1908), cert. denied 214 U. S. 514 (1909) 14

Giboney v. Empire Storage Co., 336 U. S. 490 (1948) 7

Hart Cotton Mills, Inc. v. Abrams, et al., 231 N. C. 431, 578 S. E. 2d 803 (1950) 14

Head v. Special School District No. One, 182 N. W. 2d 887 (Minn. Sup. Ct. 1971) 6, 12

International Brotherhood, etc. v. Vogt, Inc., 354 U. S. 284 (1957) 7

Jefferson City Teachers Association v. Board of Education, 463 S. W. 2d 627 (Ky. Ct. App. 1971) 6

Kirker v. Moore, 308 F. Supp. 615 (S. D. W. Va. 1970) 5

PAGE

McAleer v. New Jersey Incinerator Authority, 79 N. J. Super. 142, 190 A. 2d 891 (App. Div. 1963).... 4

McGowan v. Maryland, 366 U. S. 420 (1961)..... 19

Mechanic v. Gruensfelder, 461 S. W. 2d 298 (Mo. 1970) 14

Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N. W. 2d 358 (1966)..... 6

Mullane v. Central Hanover B. & T. Co., 331 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 895 (1949)..... 15

New Jersey Turnpike Authority v. American Federation of State Employees, 83 N. J. Super. 389, 200 A. 2d 134 (Ch. Div. 1964).....4, 6, 8

Norwalk Teacher's Association v. Board of Education, 138 Conn. 269, 83 A. 2d 482 (1951)..... 6

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Railway Mail Association v. Cordi, 293 N. Y. 315, 56 N. E. 2d 721 (1944), aff'd, 326 U. S. 88 (1945).... 5, 6

Rankin v. Shanker, 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (Ct. App. 1968)..... 6, 17

Rudikoff v. Byrne, 101 N. J. Super. 29 (Law Div. 1968) 15

State v. Standard Oil Co., 5 N. J. 281 (1950), aff'd, 341 U. S. 428 (1951)..... 15

PAGE

Thornhill v. Alabama, 310 U. S. 88 (1940) 6

Thompson v. City of Louisville, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960) 11

U. S. v. Harris, 367 F. 2d 826 (2nd Cir. 1966) 17

U. S. v. United Mine Workers, 330 U. S. 258 (1947) .. 8, 18

Williams v. Peyton, 414 F. 2d 776 (4th Cir. 1969) 11

United States Constitution Cited

First Amendment 4, 7

Fourteenth Amendment 4, 16

New Jersey Constitution Cited

1947—

Article 1, Paragraph 19 ..... 4, 9

Statute Cited

N.J.S. 2A:169-4 16

Rule Cited

Rule 4:52-4 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-226

~~No. A-55~~

JERSEY CITY EDUCATION ASSOCIATION, LOUIS T. SCIALLI, THOMAS FAVIA, SARAH GROCHOW, GAIL ROMANOWSKI, DORIS E. FILLIPPONE, ETHEL P. BROWN, DANIEL CUPO, GAIL HALL, BARBARA SCHNEIDER and ROBERT ROGENSTEIN, individually and as Officers and Members of the Executive Board of the Jersey City Education Association, and FRANK AMARATO, MARY DAVIS, MARGARET DEL PRETE, DIANNE FERRARA, BERNICE MACCHIA, NEIL PAGANO, MICHAEL WARJANKA, MAE McCOMB, MYRA DANIEL,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

Statement of the Case

Petitioners seek a Writ of Certiorari to review a judgment entered in the Appellate Division of the Superior

Court, on May 21, 1971 reported in 115 N. J. Super. 42, 278 A. 2d 206 (App. Div. 1971), which affirmed a summary conviction for contempt of the Chancery Division of the Superior Court of New Jersey. The Supreme Court of New Jersey denied certification on July 7, 1971, 58 N. J. 603 (1971). On July 23, 1971, Mr. Justice Brennan ordered a stay of the execution of the judgment pending the present petition.

The entire matter was precipitated by a strike of Jersey City teachers and the Jersey City Education Association commencing on or about February 9, 1970.

On February 8, 1970, the membership of the Jersey City Education Association voted to strike on Monday, February 9, 1970, the Jersey City School System (R. 195-4 to 197-22).

On February 9, 1970, of 1743 faculty members in the Jersey City School System, only 288 teachers attended work (R. 86-1 to 6). At 11 A.M. that day, an Order to Show Cause and restraint was issued by Hon. John J. Lynch and was served the following day upon each of the defendants named in such Order. In addition, the Order to Show Cause was published in both the Hudson Dispatch and the Jersey Journal newspapers (R. 200-19 to 25; R. 202-12 to 13).

On February 13, 1970, *nine* of the defendants herein, who were not named in the original Order to Show Cause but who had received notification of the restraint against participation in the strike were observed walking in front of School No. 12. These teachers did not attend school between February 9 and March 4, 1970 (R. 342-5 to 11).

On February 12, 1970, Judge Lynch issued an Order stating that each of the defendants named in the Order

to Show Cause was charged with contempt of Court in that on February 11, 1970, after being served with copies of Complaint and Order to Show Cause, they did refuse to desist from striking. An Order for arrest of these individuals was also issued.

On February 19, 1970, Judge Lynch issued an Order for arrest as to the other nine defendants herein charging contempt of Court in that they, on February 13, 1970, after having been informed of the injunction contained in the Order of February 9, 1970, participated in a teacher strike.

On March 18, 1970, Judge Lora found those defendants named in original Order to Show Cause guilty of contempt for failure to obey the injunctive Order of February 9, 1970. A fine of $10,000.00 was imposed on the Jersey City Education Association. Execution of judgment was stayed pending appeal.

On the same day, Louis Scialli, President of the Jersey City Education Association was found guilty of contempt and sentenced to three months in Hudson County Penitentiary, two months of which were suspended, plus a $500.00 fine, and a one-year probation. This sentence was stayed pending appeal.

In addition, each defendant named in the original Order to Show Cause of February 9, 1970 was sentenced to three months in Hudson County Penitentiary (one month to be in actual custody) plus a $500.00 fine.

The remaining individuals were each sentenced to thirty days in the County Jail, twenty days suspended, and fined $200.00 each; except Amarato, who was sentenced to thirty days in County Jail, fifteen days suspended, and fined $250.00.

POINT I

The State's right to prohibit strikes by public employees is not violative of petitioners' rights under the First and Fourteenth Amendments, and does not present a substantial federal question for examination of the right to organize.

It is clear that in New Jersey, as in most other states, public employees, including teachers, do not have the right to strike or picket against the government, whether federal, state or a political subdivision of the state. *Board of Education* v. *New Jersey Education Ass'n., et al.,* 53 N. J. 29, 247 A. 2d 867 (1968); *In re Block,* 50 N. J. 494 (1967). See also *Delaware River Authority* v. *International Organization of Masters, Mates and Pilots,* 45 N. J. 138, 211 A. 2d 789 (1965); *Donevero* v. *Jersey City Incinerator Authority,* 75 N. J. Super. 217, 182 A. 2d 596 (Law Div. 1962), rev'd on other grounds; *McAleer* v. *New Jersey Incinerator Authority,* 79 N. J. Super. 142, 190 A. 2d 891 (App. Div. 1963); *New Jersey Turnpike Authority* v. *American Federation of State Employees,* 83 N. J. Super. 389, 200 A. 2d 134 (Ch. Div. 1964).

A right to strike need not necessarily be an inherent element of the right to organize, and the New Jersey courts have recognized the distinction between public and private employment. *Board of Education* v. *New Jersey Education Ass'n. et al., supra.* Article 1, para. 19, of the New Jersey Constitution, adopted in 1947, provides:

> Persons in *private emploment* shall have the right to organize and *bargain collectively.* Persons in *public* employment shall have the *right to organize,* present to and make known to the State or any of its political subdivisions or agencies, their griev-

> ances and proposals through representatives of their own choosing. (Emphasis supplied.)

Thus, the legislature recognized the legitimate distinction between public and private employment, and the court (which has the responsibility of interpreting the New Jersey Constitution) cannot infer from this provision that the Legislature intended to depart from the common law rule that strikes by public employees are illegal. *Board of Education* v. *New Jersey Education Ass'n et al., supra,* at 46, 247 A. 2d at 876; *Donevero* v. *Jersey City Incinerator Authority, supra,* at 224, 182 A. 2d at 600, where the court in interpreting that section of the New Jersey Constitution held:

> This provision does not, in terms, confer any right on the part of public employees to strike. It was clearly the understanding and intention of the Constitutional Convention, which drafted the basic State Charter, that no such right to strike on the part of public employees was to be implied from the language used. In this respect, the then existing state of the law was not to be altered. See: *1 Proceedings of the New Jersey Constitutional Convention* of 1947, *p.* 661.

See also, *Kirker* v. *Moore,* 308 F. Supp. 615 (S. D. W. Va. 1970).

Clearly, the Legislature sought to make this distinction in the respective rights of private and public employees by not giving the latter the right to bargain collectively. It is well settled that the concept of collective bargaining includes the right to strike and other aspects of the private employer-employee relationship. See *Railway Mail Association* v. *Cordi,* 293 N. Y. 315, 56 N. E. 2d 721

(1944), aff'd 326 U. S. 88 (1945); *Delaware River Authority* v. *International Organization of Masters, etc., supra,* at 147-48, 211 A. 2d at 794; *New Jersey Turnpike Authority* v. *American Federation of State Employees, supra,* at 398, 200 A. 2d at 138-39. There is no constitutional prohibition preventing teachers from organizing under the banner of the New Jersey Education Association for the purpose of collective action in the presentation of grievances and proposals. They may not, however, achieve that end by coercive methods such as strikes, which would unlawfully halt the operation of the schools and adversely affect the public health, safety, and welfare. No constitutional issue is raised by this interpretation of the New Jersey Constitution.

The right of free speech is constitutionally subject to limitation by legitimate interests of the state which require such action. *Thornhill* v. *Alabama,* 310 U. S. 88, 104-06 (1940). It is clear that the Legislature, acting under police powers, may prohibit strikes in certain fields of endeavor when the interests of public health, safety, and welfare are involved. Teachers, as public employees, in whom the State has an appreciable interest, do not have the constitutional right to strike. See *Jefferson City Teachers Association* v. *Board of Education,* 463 S. W. 2d 627 (Ky. Ct. of App. 1971); *Head* v. *Special School District No. One,* 182 N .W. 2d 887 (Minn. Sup. Ct. *et al., supra; Rankin* v. *Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (Ct. App. 1968); *Minneapolis Federation of Teachers* v. *Obermeyer,* 275 Minn. 347, 147 N. W. 2d 358 (1966); *Pawtucket* v. *Parent Teacher's Alliance,* 87 R. I. 364, 141 A. 2d 624 (R. I. Sup. Ct. 1958); *Norwalk Teacher's Association* v. *Board of Education,* 138 Conn. 269, 83 A. 2d 482 (1951). Thus, conduct which would otherwise be constitutionally permissible in

the private employment sector can constitutionally be prohibited in the public employment sector as inconsistent with the public interest in the valid exercise of the State's police power.

The fact that petitioners refer to their conduct as "an endeavor to communicate to the community the nature of their dispute, the reasonableness thereof and solicit the support of the community in an endeavor to convince their employer that their employees have merit to their proposals" (Petitioner's Brief at 11), does not give rise to a First Amendment question where the "endeavor to communicate" was in violation of a valid state law. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (1948). In the *Giboney* case, the court held that members of a labor union were properly enjoined from picketing in violation of a state law, even though the picketing involved dissemination of truthful information about a labor dispute. The court reasoned at 502:

> "(I)t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. See *Fox* v. *Washington,* 236 U. S. 273, 277; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568."

See also *International Brotherhood, etc.* v. *Vogt, Inc.*, 354 U. S. 284 (1957).

That the legitimate distinction between public and private employment is constitutionally permissible is clear from the abundance of case law and statutes prohibiting strikes by public employees. Even where states enacted anti-injunction laws to prevent abuses resulting from its

use in labor disputes, it was held not to be applicable to disputes, between the state or any political subdivision and its own employees. *U. S.* v. *United Mine Workers*, 330 U. S. 258, 272 (1947); *N. J. Turnpike Authority* v. *American Federation of State Employees, supra; Delaware River and Bay Authority* v. *International Organization of Masters, Mates and Pilots, supra.*

Petitioners question the "non-essentiality" of the teachers' function and the State's interest in it when compared with that of a fireman or policeman. The New Jersey Suprme Court in holding that employees of the Delaware River and Bay Authority who operated ferries had no right to strike as public employees, referred to this position as

> "an ill-defined concept of doubtful strength . . . (which) has wisely been rejected, in the cases dealing with the prohibitory policy against strikes by public employees." *Delaware River and Bay Authority, supra,* at 146, 211 A. 2d at 793.

The suspension of the fundamental role of the educational system in any state would clearly be inimical to the state's interest in the education of its young and welfare of its citizenry. Under the circumstances as set forth above, petitioner's argument that a prohibition upon their striking constitutes a violation of rights under the First and Fourteenth Amendments does not present a question which merits review by this Court.

POINT II

The injunctive order was not unconstitutional for overbreadth and vagueness and did not prohibit constitutionally mandated actions.

Petitioners contend that Article I, para. 19 of the New Jersey Constitution granted to petitioners a right to absent themselves from school in order to attend a meeting of the Board of Estimate of Jersey City on February 11, 1970. They argue that such conduct should not have been found violative of the injunctive order issued February 9, 1970 and served upon them on February 10, 1970. Clearly the Scialli group, as officers and members of the Executive Board of the Jersey City Education Association, played an integral role in the strike vote of February 9 and resultant work stoppage. The record of the trial below indicates that, above and beyond the mere presence of certain petitioners at the Board of Estimate meeting during normal school hours, which presence thereby caused absence from school without excuse or explanation, in violation of school regulations, there was considerable independent evidence that a strike was in progress and that the petitioners were participating in the strike.

Petitioner's involvement in such a concerted and unauthorized work stoppage cannot be construed as constitutionally protected conduct under New Jersey Constitution, Art. I, §19.

Officers and members of the Executive Board of the Jersey City Education Association were served on February 10, 1970, with copies of the Order to Show Cause issued by Judge Lora (R. 202-14 to 209-10). The restraining order clearly prohibited the defendants named therein from further participation in the strike. Yet the very

next day, following service upon each named individual, the restraining order was undeniably ignored. Petitioners herein assert that their absence from work on February 11 was a mere exercise of the right to organize, the right of free speech, petition and assembly. This argument is blithely oblivious to the plain truth that an illegal teachers' strike was in progress, and that these petitioners, as well as the great majority of the membership of the Jersey City Education Association, of which these petitioners comprised the officers and Executive Board, were participating in such strike by refusing to attend classes. The fact that the petitioners on February 11, 1970, while they were staying away from classes, as they had done on the two school days previous to February 11, were found to be attending a meeting of the Association cannot reasonably mitigate or even explain why they did not report for work. That the meeting could not have been scheduled for a time outside of the normal school hours cannot be seriously maintained.

In addition, the absence from school of these petitioners, without excuse or explanation on February 11 should be considered in conjunction with other facts surrounding these absences. The petitioners were leaders of the organization which participated in the strike. They absented themselves from work, without explanation, under circumstances which rule out excusable absence. Their claim of constitutional privilege in this respect is ill-founded and does not merit review by this Court.

POINT III

The findings of the trial Court that petitioners had violated the injunctive order was supported by the evidence and presents no constitutional question.

The scope of federal review of a decision of a state court is limited solely to the question of whether *any* supporting evidence was in the trial record. The probative strength of such evidence, or the supporting of such evidence, is not a constitutional issue. *Thompson* v. *City of Louisville,* 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960); *Williams* v. *Peyton,* 414 F. 2d 776 (4th Cir. 1969); *Cunningham* v. *Maroney,* 397 F. 2d 724, 725 (3rd Cir. 1968), cert. den. 393 U. S. 1045 (1969).

In the case *sub judice* proof of violation of the injunction order was not only submitted by the State but was clearly sufficient to justify the conclusion reached by the Court.

The evidence adduced at trial indicates that on Sunday, February 8, 1970, a meeting of the Jersey City Education Association took place, during which meeting the decision was made to strike the Jersey City Schools the next morning (R. 195-6 to 197-22). Francis McCarthy, Assistant Superintendent of Schools, testified that although the total staff of the Jersey City School System was 1743 members, from February 9 until March 2, 1970, the daily attendance of school personnel varied between 288 and 400 (R. 86-1 to 87-2). The normal rate of teacher absences had been approximately 8 to 10%; the rate of absence between February 9 and March 2, 1970 was abnormally high (R. 89-21 to 91-8). During this period picket lines were observed at several schools. Various officers and members of the Jersey City Education Asso-

ciation were, on February 10, 1970, served with copies of the Order to Show Cause issued by Judge Lynch (R. 202-14 to 209-10). The Order was published in two local newspapers (R. 200-19 to 25). Defendants herein who were not named in the original Order to Show Cause were seen picketing in front of School No. 12 on February 13, 1970 (R. 340-16 to 343-19).

The State submits that the above facts fully support the trial Court's finding of violations of the Order to Show Cause. *In Re William Block et als.*, 50 N. J. 494 (1967); *In Re Ruth M. Buehrer et al.*, 50 N. J. 501 (1967).

There can be no serious doubt that a strike was in progress and that these petitioners, by their unexplained absence from school, were participating in such strike.

Teachers who absent themselves from school subsequent to circumstances which are clearly indicative of a work stoppage, are in effect "on strike". See *Head* v. *Special School District No. One, supra; Prouzan* v. *Board of Education,* 25 Misc. 2d 945, 209 N. Y. S. 2d 966 (Spec. Term 1960), aff'd 12 A. D. 2d 923, 215 N. Y. S. 2d 718 (Sup. Ct. 1st Dept. 1961), aff'd 9 N. Y. 2d 911, 176 N. E. 2d 96, 217 N. Y. S. 2d 86 (Ct. App. 1961).

POINT IV

Each defendant below had adequate notice of the order to show cause.

Counsel for defendants conceded at the trial that those individuals whose names appeared in the original Order to Show Cause had been properly served with the Order (R. 201-8 to 202-2). However, the issue of notice and knowledge of the outstanding injunctive Order was raised and is re-asserted on appeal as to those defendants whose

names did *not* appear on the Order of February 9, 1970, and who were not personally served. The trial Court found that these defendants were sufficiently notified of the existence of the restraining Order, and that the restraint applied to all teachers in the Jersey City School System, by the publication pursuant to direction of Judge Lynch, of full page reproductions of the Order to Show Cause on February 10, 1970, in both the Hudson Dispatch and the Jersey Journal (R. 405-12 to 406-7). Defendants attack this finding.

The Court's conclusion that there indeed was notice was based in part upon the *numerous newspaper articles admitted on the issue of notice* (R. 187-3 to 9), many of which clealy indicate that Jersey City Teachers had been ordered by Judge Lynch not to strike. Also considered was the fact that the Order of Arrest as to the defendants on February 19, 1970, referred to *alleged activities on February 13, 1970,* which *was several days after the original Order that Judge Lynch issued* and was published in the previously mentioned newspapers. Under the circumstances, an inference that the defendants had received *reasonable* notice was not improper.

Apparently, *notice rather than service* of a restraining Order is determinative of a defendant's culpability under the law. Rule 4:52-4 of the Courts of the State of New Jersey specifically provides that:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance . . . and is binding only upon such parties to the action and such of their officers, agents, employees, and attorneys, and upon such persons in active concert or participation with them as receive actual notice of the order by personal service *or otherwise.*" (Emphasis supplied.)

Moreover, in *In Re Ruth M. Buehrer, et al., supra,* the New Jersey Supreme Court apparently recognized that notice, not service of a restraining Order is a pivotal issue in a prosecution for violation of such restraining Order. See also *Cross Co.* v. *United Automobile Workers,* 377 Mich. 202, 139 N. W. 2d 694 (1966); *Hart Cotton Mills, Inc.* v. *Abrams, et al.,* 231 N. C. 431, 578 S. E. 2d 803 (1950). Notice can be established by circumstantial evidence. *Mechanic* v. *Gruensfelder,* 461 S. W. 2d 298 (Mo. 1970). In the instant case, the petitioners apparently are sophisticated and well-educated people who presumably would know that strikes in their profession are prohibited by state law. Certainly the lines of communication were sufficient to swiftly and decisively indicate to them that a strike had been called, since they remained out of school and indeed engaged in picketing. The argument that they had no notice of the restraining Order, in such case, after it had been published in the two most widely read newspapers in the County, implies a certain naivete to these petitioners which does not conform with the circumstances. The Appellate Division cited the case of *Garrigan* v. *U. S.,* 163 F. 16 (7th Cir. 1908), *cert. denied* 214 U. S. 514 (1909) in showing that actual notice may be inferable from the facts. Petitioners cite the case (Brief at 21) as conclusive to the point that notice could not be imputed from the mere fact of the advertisement of the injunctive order in the newspaper publication. However, certain distinguishable points are evident in this case. First, the case refers to an *alleged* publication, thereby raising a question in the court's mind as to the actual existence of such publicity. In addition, the date of the case would also indicate that at that time a newspaper as a reasonable means of notice might be questioned. In the *Garrigan* case a private company had obtained an injunction restraining various trade or-

ganizations and named individuals. Defendant therein was a fireman and substantial proof was admitted indicating that he was, in fact, assisting the police in quelling a riot. Moreover, none of the named defendants who had received service of the Order were ever involved in a violation of the same.

It is submitted that the publication of the Order to Show Cause in two local newspapers, each of county-wide distribution, was a *reasonable means* of providing notice to these defendants and that the finding of the Court that defendants received notice of the Order was proper under the circumstances of the case. Clearly, the court would not be expected to serve the entire membership of the Jersey City Chapter of the New Jersey Education Association with copies of the restraining Order. The court was faced with the dilemma of notifying many hundreds of persons in the shortest possible amount of time in order to stave off what it no doubt considered a threat of imminent injury to the public. In such a case it was neither reasonably possible nor practical to give more adequate notice than that afforded by publication. *Mullane* v. *Central Hanover B. & T. Co.*, 331 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 895 (1949); *State* v. *Standard Oil Co.*, 5 N. J. 281, 308 (1950), aff'd 341 U. S. 428 (1951); *Rudikoff* v. *Byrne*, 101 N. J. Super. 29 (Law Div. 1968).

POINT V

Equal protection of the laws and due process guaranteed by the Fourteenth Amendment were not denied petitioners by the imposition of a fine of $10,000 on the New Jersey Education Association and the Court below was not limited to the maximum fine set forth in N.J.S. 2A:169-4.

The statute relied upon by petitioners in their brief, N.J.S. 2A:169-4, is set forth as follows:

> Except as otherwise expressly provided, a person adjudged a disorderly person shall be deemed to have been guilty of a petty offense and shall be punished by imprisonment in the county workhouse, penitentiary, or jail for not more than 6 months, or by a fine of not more than $500.00, or both.

To limit the amount of fine applicable to an association, the membership of which numbers approximately 1750 in the Jersey City school system alone to a maximum of $500.00 for criminal contempt, is to remove from the courts of this State the power to impose summarily anything but a meaningless and insignificant fine in punishment for contempt where a large group of individuals is involved.

The State submits that the case of *Bloom* v. *Illinois*, 391 U. S. 194 (1967) which is cited in the opinion of the Appellate Division, is dispositive of the issue as to the "serious" or "petty" classification of the offense of criminal contempt, *where there is an imposition of a prison sentence*. In the *Bloom* case, the defendant was convicted in Illinois of criminal contempt and sentenced to *24 months imprisonment* for willfully petitioning to

admit to probate a will falsely prepared and executed after the testator's death. The court held it was error to deny his request for a jury trial, applying the rule that where the legislature has not expressed judgment as to the seriousness of an offense by fixing a maximum penalty (as is the status of the offense of contempt in New Jersey) the seriousness of the offense can be ascertained by looking at the penalty actually imposed. Thus, the Court, recognizing the *sui generis* nature of the offense of criminal contempt and the need to maintain the imposition of a penalty for a violation of the same in the discretion of the trial judge, insisted that a defendant receive the procedural protection of the right to trial by jury where the terms of imprisonment exceeded 6 months. Subsequently, the Court affirmed the summary conviction of a defendant charged with criminal contempt for violating an injunction where he was sentenced to a 6 month-or-less term of imprisonment. *Frank* v. *United States,* 395 U. S. 147 (1968). See also *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966); (Here the corporation was fined $100,000); *U. S.* v. *Harris,* 367 F. 2d 826 (2nd Cir. 1966); *In re Buehrer, supra.*

The State further submits that the Appellate Division correctly reasoned that the imposition of a fine in excess of $500.00 against a union whose membership ranges in the hundreds, did not render the offense of criminal contempt a "serious" offense within the meaning of *Bloom* v. *Illinois, supra.* As the Appellate Division pointed out, the case of *Rankin* v. *Shanker, supra,* meets this issue head on:

> "[T]he fine, even though sizeable in amount furnishes no valid criterion for the defendants' claim that the contempt charged against them constitutes a serious crime." (295 N. Y. S. 2d at 632-633).

The summay power of the courts to impose a fine is especially crucial in attempting to halt immediately the illegal activities of a union of public employees which are inimical to the public welfare.

The language of the Supreme Court in *United States* v. *United Mine Workers of America, supra,* where it was held that the union had no right to a trial by jury despite a fine of $700,000, is still valid to define for the trial judge a standard to use in his discretion in order to determine the severity of the fine which should be imposed:

> "In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge." *Id.* at 303.

> "But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

> "It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's finan-

> cial resources and the consequent seriousness of the burden to that particular defendant." *Id.* at 304.

Petitioner's argument that the exercise of such discretion is violative of the Equal Protection and Due Process clauses of the Fourteenth Amendment is without merit. Clearly, the imposition of the fine is an action directly related to the preservation of the State's interest in the educational system and the substantial size of such fine is required in order to emphasize the gravity of the harm to the public. See *McGowan* v. *Maryland,* 366 U. S. 420 (1961).

CONCLUSION

For the reasons set forth, the petition for certiorari should be denied.

Respectfully submitted,

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